STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2004
v	No. 243418 Oakland Circuit Court
PARIS LANCE SCOTT, Defendant-Appellant.	LC No. 2001-177475-FH

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of attempted unarmed robbery, MCL 750.530, MCL 750.92. The trial court sentenced defendant to fourteen months to five years in prison. We affirm.

I. Motions for Directed Verdict and Judgment of Acquittal

Defendant contends that the trial court erred by denying his motion for directed verdict and his post-trial motion for entry of a judgment of acquittal because the prosecutor presented insufficient evidence to support his attempted unarmed robbery conviction.

As this Court explained in *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2003):

> "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The *Werner* Court also stated that, "[w]hen a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt." *Id*. at 530-531, citing *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222, 646 N.W.2d 875 (2002). " 'The essential elements of an attempted unarmed robbery are (1) an attempted felonious taking of property from the person

of another or in his presence, (2) by force and violence or by assault or by putting in fear, and (3) defendant being unarmed.' " *People v Reeves*, 458 Mich 236, 242; 580 NW2d 433 (1998), quoting *People v Sanford*, 402 Mich 460, 474 n 1; 265 NW2d 1 (1978).

Defendant says that the prosecutor failed to show that he intended to rob or attempted to rob the victim. The record reflects that defendant, along with a group of several other young men, approached the victim and his friend while they were walking home from school. At one point, someone from the group suggested that they rob the victim and defendant reached for and touched the victim's pocket. The victim "shrugged" defendant away and tried to flee, but another member of the group pushed the victim toward defendant and defendant punched the victim in the face. A fight ensued, during which members of the group repeatedly hit the victim and kicked him after he fell to the ground. Someone in a Jeep Cherokee pulled up to the altercation and the group of attackers fled the scene. This evidence established that, after the group closed in on the victim and, in immediate response to the suggestion that they rob him, defendant grabbed for the victim's pocket.[1] The victim was able to repel defendant, but was then seriously beaten by the group. Clearly, the evidence was sufficient for a reasonable juror to conclude that defendant intended to rob the victim and made an attempt to do so.[2]

We also reject defendant's assertion that his conviction was improper because the attempted robbery occurred before defendant struck the victim in the face. Defendant urges us to find that the trial court improperly allowed the jury to render its verdict under the "transactional approach" to robbery. However, regardless whether defendant was physically beaten *after* defendant attempted to rob him, it is well settled that "attempted robbery unarmed may . . . be committed simply by putting someone in fear . . . ." *Sanford, supra* at 473. The group moved in on the victim before the robbery and promised "to send [the victim and his friend] back [to their neighborhood] messed up, beat up . . . ." The victim testified that he feared an imminent fight. Clearly, the prosecutor established that, before and during the attempted robbery, defendant and the other young men placed the victim in fear by surrounding him and threatening him with physical violence.[3]

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[1] The victim testified that he was carrying his wallet, money and keys.

[2] We reject defendant's assertion that any intent or attempt was negated by the fact that defendant did not make *repeated* attempts to take the victim's wallet. After defendant's clear attempt to rob the victim, the gang's attack was interrupted only a minute or two later by a passing vehicle. That defendant failed to rob the victim during that short period does not change the ample evidence supporting his attempt conviction.

[3] The trial court also denied defendant's motion for a new trial. As this Court recently reiterated in *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003):

> The standard of review applicable to a denial of a motion for a new trial is whether the trial court abused its discretion. The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. [Quoting *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989).]

(continued…)

II. Sentencing

Defendant claims that certain sentencing guidelines variables were misscored and that he is entitled to resentencing. The alleged scoring errors are not preserved for appeal because defendant did not raise them at or before sentencing and defendant does not assert that he raised the inaccuracies as soon as they could reasonably have been discovered. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 164-166; 649 NW2d 801 (2002). Therefore, we review defendant's claims for clear error affecting his substantial rights. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). As our Supreme Court explained in *Carines*, "[t]o avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Carines, supra* at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.' " *Id*. at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 LEd2d 508 (1993). Further, it is well settled that "[s]coring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

We find no plain error in the disputed scores. Defendant asserts that he should not have received fifty points under offense variable 7 (OV 7), "aggravated physical abuse," because the fight "did not rise to the level [of] terrorism or sadism." OV 7 provides that fifty points should be scored if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Evidence established that the victim was approached, surrounded, and seriously beaten by a gang of at least six to eight young men who engaged in "conduct designed to substantially increase the victim's fear and anxiety." The record clearly supports defendant's fifty-point score.

Defendant correctly received a score of ten points for OV 9, "number of victims." MCL 777.39(1)(c) and MCL 777.39(2)(a) provide that a defendant should be scored ten points if two to nine victims were "placed in danger of injury or loss of life as a victim." Here, defendant and the other group members approached the victim and his friend, threw "ice packs" at them, and threatened to beat them up. Evidence also established that the group surrounded the victim and the attempted robbery occurred when the victim's companion was approximately three or four feet away from the victim. These facts support the trial court's score of ten points because the victim's friend was also "placed in danger of injury."

(…continued)

To support his assertion that the trial court erred by denying this motion, defendant relies on the arguments set forth for his directed verdict and acquittal motions. Similarly, for the reasons set forth in our analysis of those claims, we reject defendant's argument that he is entitled to a new trial.

Defendant also disputes his ten-point score for OV 14 because he was not "a leader in a multiple offender situation." MCL 777.44(1)(a). The record reflects that defendant took the initiative by attempting to rob the victim and he was the first person to throw a punch. This was sufficient evidence for the trial court to assess defendant ten points for OV 14.

In a footnote, defendant also challenges the trial court's decision to correct his score for prior record variable 5 (PRV 5). We find no plain error in the two-point correction of defendant's score. Defendant had a prior adjudication for a charge of retail fraud second. While defendant was assigned youthful trainee status under the Holmes Youthful Trainee Act, MCL 762.11, *et seq*., this adjudication was properly considered in scoring PRV 5. MCL 777.50(4)(a)(i).

Defendant further asserts that he is entitled to resentencing because the trial court imposed a sentence outside the guidelines range without articulating substantial and compelling reasons for the departure. This argument ignores the fact that the trial court corrected defendant's prior record variable 5 (PRV 5) score which, in turn, changed the upper limit of the recommended minimum sentence range from seventeen months to twenty-three months. Defendant does not dispute the trial court's conclusion that the additional two points placed defendant in a different sentencing category with an upper limit of twenty-three months. Because the upper limit of defendant's minimum sentence exceeded eighteen months, defendant was not entitled to an intermediate sanction and the trial court was not obligated to articulate substantial and compelling reasons for sentencing defendant to fourteen months in prison. MCL 769.34(4)(a), (4)(c).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly